



Volume 14 | Issue 2

Article 3

2003

Timpanogos Tribe v. Conway: Fishing for an Exception to State Sovereign Immunity in Natural Resource Regulation

Susan R. Fiorentino

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/elj>



Part of the [Environmental Law Commons](#), and the [Indian and Aboriginal Law Commons](#)

Recommended Citation

Susan R. Fiorentino, *Timpanogos Tribe v. Conway: Fishing for an Exception to State Sovereign Immunity in Natural Resource Regulation*, 14 Vill. Envtl. L.J. 255 (2003).

Available at: <https://digitalcommons.law.villanova.edu/elj/vol14/iss2/3>

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

*TIMPANOGOS TRIBE V. CONWAY: FISHING FOR AN
EXCEPTION TO STATE SOVEREIGN IMMUNITY IN
NATURAL RESOURCE REGULATION*

“At times, we did not have enough to eat and we were not allowed to hunt. All we wanted was peace and to be let alone.”

—Crazy Horse of the Sioux

I. INTRODUCTION

The land and its natural resources have always played an integral role in the lives of Native Americans.¹ Hunting and fishing on tribal reservations provide tribes with more than just food; such activities often carry religious symbolism as well.² Throughout the history of the United States, Native Americans have enjoyed a high degree of sovereignty over the lands they occupy.³

In recent years, environmental groups have questioned unregulated tribal dominion over hunting and fishing resources, arguing that state and federal regulations that protect wildlife should apply to tribes.⁴ These groups have ignited public debate about the regulation of natural resources on Indian reservations.⁵ In addition, states claiming authority to regulate natural resources within state boundaries have clashed with tribes claiming sovereignty over natu-

1. See, Laurie Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C. L. REV. 743, 743 (1984) (citing central role of land and its resources in lives of Native Americans).

2. See, Carl H. Johnson, *Balancing Species Protection with Tribal Sovereignty: What Does the Tribal Rights-Endangered Species Order Accomplish?*, 83 MINN. L. REV. 523, 525 (1998) (stating numerous species of plants and animals are spiritually and culturally significant for Indian tribes).

3. See Reynolds, *supra* note 1, at 743 (discussing source and scope of Indian sovereignty). For a discussion of the historical development of Native American sovereignty, see *infra* note 32 and accompanying text.

4. See, Johnson, *supra* note 2, at 526 (discussing balance between Endangered Species Act [hereinafter ESA] and tribal sovereignty). For a discussion of the current relationship between environmental groups and Native American tribes, see *infra* notes 72-81 and accompanying text.

5. See David Rich Lewis, *Native Americans and the Environment: A Survey of Twentieth Century Issues*, 19 AMER. INDIAN Q. 423 (1995), available at http://www.cpluhna.nau.edu/Research/native_americans4htm (discussing hunting and fishing rights of Native Americans and interaction with environment).

ral resources within the boundaries of their reservations.⁶ This clash has spawned lawsuits, as courts attempt to draw a line between tribal rights and state rights.⁷ Tribes have faced complications when they seek to sue a state in federal court; often, the Eleventh Amendment of the Constitution will bar such an action.⁸ This restriction is not absolute, and courts have made exceptions, particularly when the suit is brought against a state official instead of the state generally.⁹

In *Timpanogos Tribe v. Conway*¹⁰ the Tenth Circuit Court of Appeals held that the Eleventh Amendment did not bar a tribe's suit against a state official for declaratory relief from Utah's hunting and fishing regulations.¹¹ This Note examines the validity of that holding in light of recent Supreme Court jurisprudence concerning the Eleventh Amendment.¹² Part II of this Note summarizes the facts involved in *Timpanogos Tribe*.¹³ Part III provides background information about tribal hunting and fishing rights, the conflict between environmental groups and tribes, and Eleventh Amendment issues when tribes try to sue states.¹⁴ Part IV analyzes the Tenth Circuit's reasoning in the case.¹⁵ Part V suggests that the

6. See *id.* (discussing apparent conflict between state laws and tribes); see also Joe W. Stuckey, *Tribal Nations: Environmentally More Sovereign than States*, 31 ENVTL. L. REP. 11198 (Oct. 2001) (noting jurisdictional conflict between states and tribes with respect to environmental regulations).

7. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (holding treaty rights reconcilable with state sovereignty over natural resources); see also *United States v. Washington*, 694 F.2d 1374 (9th Cir. 1982) (addressing off-reservation treaty rights between tribes and state). For other examples of lawsuits between tribes and states, see generally 41 AM. JUR. 2D *Indians* § 64 (2002).

8. U.S. CONST. amend. XI. The Eleventh Amendment of the Constitution states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.* The Supreme Court held that the protection of the Eleventh Amendment did not extend to Indian Tribes in *Blatchford v. Village of Noatak*, 501 U.S. 775, 782 (1991).

9. See *Ex parte Young*, 209 U.S. 123, 163 (1908) (holding suit against state official not barred if prospective relief is sought).

10. 286 F.3d 1195 (10th Cir. 2002).

11. See *id.* at 1205 (holding *Ex parte Young* applicable, and action not barred by Eleventh Amendment).

12. For a discussion of current Supreme Court decisions that seem to limit the application of *Ex parte Young*, see *infra* notes 107-22 and accompanying text.

13. For a discussion of the facts of *Timpanogos Tribe*, see *infra* notes 18-28 and accompanying text.

14. For a discussion of the scope of treaty rights, environmental conflicts and the Eleventh Amendment, see *infra* Part III.

15. For a discussion of the Tenth Circuit's reasoning in the case, see *infra* notes 123-34 and accompanying text.

Tenth Circuit's reasoning failed to adequately address the additional Eleventh Amendment restrictions imposed by the Supreme Court's 1997 decision in *Idaho v. Coeur d'Alene*.¹⁶ Finally, Part VI argues that, by declining to consider the full impact of the Eleventh Amendment on tribal natural resource litigation, the Tenth Circuit missed an opportunity to consider the degree to which a state's environmental regulation may trump tribal treaty rights.¹⁷

II. FACTS

The Timpanogos Tribe Snake Band of Shoshone Indians (Tribe) occupies the Uintah Valley Reservation in Utah.¹⁸ An 1864 treaty between the Tribe and the Federal government granted the Tribe the right to hunt, fish and gather on the reservation, free from state regulation.¹⁹ Since then, the Utah State Division of Wildlife Resources has imposed regulations prohibiting the hunting of elk and deer without proper state-issued licenses.²⁰ Tribal members hunt with tribe-issued licenses.²¹ In the summer of 2000, state officials threatened criminal prosecution against anyone not using a state-issued license to hunt or fish.²²

In August of 2000, the Tribe brought suit in the District Court of Utah against Kevin Conway, Assistant Director of the Utah Department of Natural Resources, as well as Utah Governor Michael Leavitt.²³ The suit sought injunctive relief from state licensing regulations and declaratory relief stating "that Messrs. Conway and Leavitt have no authority to regulate or control the hunting, fishing, or gathering rights of the Timpanogos Tribe on Indian lands within the Reservation."²⁴

16. 521 U.S. 261 (1997).

17. For a discussion of what some feel is an alarming trend in the Court's reading of the Eleventh Amendment, see Sharon Buccino et al., *Hostile Environment: How Activist Judges Threaten Our Air, Water, and Land, An Environmental Report on Judicial Selection*, Natural Resources Defense Council (July 2001), available at <http://www.nrdc.org/legislation/hostile/hostile.pdf>. Buccino argues that the Eleventh Amendment has been twisted in recent years to excuse state compliance with federal environmental laws. *Id.* at vi.

18. See *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1198 (10th Cir. 2002) (identifying geographic location of Tribe).

19. See *id.* at 1199 (describing terms of Treaty of 1864).

20. See Jacob Santini, *State Still Can't Charge Tribal Hunters*, SALT LAKE TRIB., Apr. 16, 2002, at D2 (discussing state-imposed regulations for hunting).

21. See *id.* (noting lack of state licensing for tribal members).

22. See *id.* (noting threat of prosecution for those hunting without state license).

23. See *Timpanogos Tribe*, 286 F.3d at 1198 (noting suit participants).

24. *Id.* at 1199 (stating language of allegations against defendants).

State officials filed a motion to dismiss, arguing that the Eleventh Amendment's prohibition against suits by citizens of a state barred the suit.²⁵ The District Court for the District of Utah denied the motion to dismiss on the grounds of Eleventh Amendment immunity, and the state officials brought this interlocutory appeal.²⁶ The Tenth Circuit Court of Appeals held that the Eleventh Amendment did not bar the suit because the suit falls within the exception to sovereign immunity.²⁷ This exception allows suits against state officials seeking prospective declaratory or injunctive relief.²⁸

III. BACKGROUND

A. Tribal Sovereignty of Hunting and Fishing Rights

Native Americans have long possessed an aboriginal right to occupy the land they inhabited before European encroachment.²⁹ The preservation of that right emanated from treaties made between tribes and the federal government, where the government agreed to respect the sovereignty of the tribes.³⁰ Treaty rights are legally binding against the federal government and, based on the Supremacy Clause of the Constitution, are superior to state law.³¹

Treaty rights extend to hunting and fishing on aboriginal lands, free from any governmental interference, unless the federal government chooses to extinguish those rights.³² Congress, how-

25. *See id.* (noting five issues under which suit should be dismissed).

26. *See id.* (stating reason for denying motion). The Tenth Circuit reviewed the requirements for an interlocutory appeal and determined that, while normally, courts of appeal exercise jurisdiction only over final decisions of the district courts, there are exceptions. *See id.* "It is well-established that orders denying individual officials' claims of absolute and qualified immunity are among those that may be immediately appealed." *Id.*

27. *See id.* at 1206 (stating Tenth Circuit's decision to affirm district court's decision).

28. *See Timpanogos Tribe*, 286 F.3d at 1206 (describing exception to sovereign immunity).

29. *See Reynolds*, *supra* note 1, at 744 (discussing source and scope of Indian hunting and fishing rights).

30. *See Elizabeth Roat, Analyzing Conflicts Between Indian Treaty Rights and Federal Conservation Regulations: Are State Regulation Standards Appropriate?*, 84 MARQ. L. REV. 701, 704 (2001) (discussing foundations of Indian law).

31. *See id.* (noting that treaties with tribes have same status as treaties with foreign nations). The Supremacy Clause states that the United States Constitution is the supreme law of the land. *See* U.S. CONST. art. VI.

32. *See Reynolds*, *supra* note 1, at 745. (discussing when government may abrogate rights). Congress may abrogate treaty rights but is reluctant to do so in the absence of an explicit statement, claiming that hunting and fishing rights are important property rights that may be exercised free from government interference. *See id.* at 755. Deference to Indian sovereignty springs from the historical relationship between the federal government and tribes. *See id.* For a discussion of the

ever, is reluctant to abrogate treaty rights because they are viewed as property rights running with the land.³³ Hunting and fishing rights can be granted explicitly by treaty, or they can be inferred from “oral or implied agreement that the tribes could continue to hunt and fish on areas over which they had relinquished their aboriginal title.”³⁴ In addition, hunting and fishing rights may extend to off-reservation sites if the site is necessary for tribal livelihood.³⁵ The right to fish and hunt extends only to Native American groups who have maintained tribal status, but federal recognition of the tribe is not required as a condition of exercising treaty rights.³⁶

It is evident that “Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them.”³⁷ Although tribal hunting and fishing rights appear unlimited, tribes accept responsibility to regulate on-reservation hunting and fishing activities of their members.³⁸ To achieve that goal, “various tribes have adopted game and wildlife codes that control the time, place, and manner of member hunting and fishing.”³⁹ Tribal courts maintain jurisdiction over violations of these codes.⁴⁰

development of the federal trust responsibility relationship, see Nell Jessup Newton, *Federal Power Over Indians: Its Source, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984). Newton discusses the development of the trust relationship between the federal government and Indian tribes, where the federal government viewed the relationship as similar to that between a guardian and ward. *See id.* at 204. In addition, from the earliest point in the nation’s history, the courts have deferred to Congress’s authority to regulate tribes under the “plenary powers” doctrine. *See id.* at 196. For a general discussion of the relationship between tribes and the federal government, see 41 AM. JUR. 2D *Indians* § 5 (2002).

33. *See* Roat, *supra* note 30, at 705 (discussing reluctance of Congress to abrogate treaty rights). Abrogation of treaty rights must be based on clear evidence from Congress that it intended to do so. *See id.*

34. *See* Reynolds, *supra* note 1, at 746 (explaining how hunting and fishing rights may be granted).

35. *See id.* at 750-51 (referring to Court’s interpretation of when off-site hunting is permissible). Courts will look to such factors as “reasonable livelihood expectations” to decide whether off-site fishing or hunting is permissible. *Id.* at 751.

36. *See id.* at 754 (noting that federal recognition not prerequisite to vitality of treaty rights).

37. 41 AM. JUR. 2D *Indians* § 64 (2001). Hunting and fishing rights are valid whether or not they were expressly mentioned in the treaty, unless these rights have clearly been relinquished by treaty or modified by Congress. *See id.*

38. *See* Reynolds, *supra* note 1, at 759-60 (recognizing undisputed right of tribe to regulate members’ hunting and fishing rights).

39. *Id.* at 760. In addition, tribes have jurisdiction over non-members who attempt to hunt or fish on the reservation based on their sovereignty over reservation lands. *See id.* at 761.

40. *See id.* at 760 (stating that violations of tribal codes are subject to criminal jurisdiction of tribal courts).

B. State Regulation of Hunting and Fishing on the Reservation

A basic premise of state sovereignty is a state's ability to regulate in the interest of the health and safety of its citizens.⁴¹ This includes environmental regulations.⁴² It is equally true, however, that "[a]lthough the state normally enjoys great latitude in regulating the management of game and wildlife, its police power is reduced significantly when treaty rights are implicated."⁴³ Generally, states may not regulate a tribe's right to hunt and fish within the boundaries of a reservation.⁴⁴ In recent years, courts have reevaluated that premise, balancing a tribe's sovereignty in the area of hunting and fishing against the state's interest in protecting natural resources.⁴⁵

In 1977, the Supreme Court announced a "conservation necessity exception" to the rule that states may not regulate tribal hunting and fishing rights in *Puyallup Tribe v. Department of Game of State of Washington* (*Puyallup III*).⁴⁶ This case was preceded by two other *Puyallup* decisions (*Puyallup I* and *Puyallup II*) that sought to specify when fishing treaty rights may be abrogated in favor of state regulations.⁴⁷ In the *Puyallup* litigation, the State of Washington enacted a fishing regulation that restricted the number of steelhead trout that Puyallup Indians could catch by net both on and off the reservation.⁴⁸ In addition, tribal members had to file a report with the State Department of Game, listing members who were eligible to

41. See U.S. CONST. amend. X. The Tenth Amendment states "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* This Amendment has been interpreted to give states control over health and welfare concerns of its citizens. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (holding state legislation regulating violent crime, family law, and divorce, as "traditional state regulation" under Tenth Amendment).

42. See, e.g., *Puyallup Tribe v. Dep't of Game of State of Wash.*, 391 U.S. 392, 398 (1968) [hereinafter *Puyallup I*], (recognizing interest of state to regulate natural resources).

43. Reynolds, *supra* note 1, at 770 (stating that government regulation is diminished when treaty rights are implicated).

44. See 41 AM. JUR. 2D *Indians* § 64 (2002) (discussing rights of tribes to hunt and fish within reservation boundaries); see also Reynolds, *supra* note 1 at 743 (discussing tribal sovereignty to hunt and fish on reserved lands).

45. See Reynolds, *supra* note 1, at 766 (arguing tribal sovereignty is limited by federal recognition of rights).

46. 433 U.S. 165 (1977) [hereinafter *Puyallup III*].

47. See 391 U.S. 392 (1968); see also 414 U.S. 44 (1973). In *Puyallup I*, the Court held that a state court may exercise jurisdiction over the rights of a tribal member of a federally recognized tribe. See *Puyallup I*, 391 U.S. at 398. In *Puyallup II*, the Court directed a fair apportionment of steelhead trout between tribal and non-tribal members. See *Puyallup II*, 414 U.S. at 48-9.

48. See *Puyallup III*, 433 U.S. at 167 (discussing Washington State regulation).

fish, along with the number of fish caught each week.⁴⁹ The Puyallup brought suit, arguing that its sovereign authority over reservation lands prohibited the state from imposing such a regulation.⁵⁰ In particular, the Puyallup argued that the Treaty of Medicine Creek granted the Tribe the right to fish unencumbered by state regulation.⁵¹ State officials argued, however, that the fishing rights were shared with other state citizens, making them subject to state regulation.⁵² The Supreme Court ruled in favor of the State, holding that the right to fish “was subject to reasonable regulation by the state pursuant to its power to conserve an important natural resource.”⁵³ The Court recognized that, in this instance, the police power of the state extended to protect the steelhead trout from possible extinction.⁵⁴

While *Puyallup III* enunciated the “conservation exception,” *Puyallup I* determined which conservation regulations may validly abrogate treaty rights.⁵⁵ Such a determination is based on a three-part inquiry.⁵⁶ The Court stated that the fishing rights at issue “may be regulated by the State [1] in the interest of conservation, [2] provided the regulation meets appropriate standards and [3] does not discriminate against the Indians.”⁵⁷

The first inquiry focuses on whether the actual conservation measure is necessary.⁵⁸ Under this inquiry, the Court held that the

49. *See id.* (discussing particulars of fishing regulation).

50. *See id.* (describing Tribe’s theory of sovereign authority).

51. *See id.* at 174-75 (citing treaty language). Specifically, Article III of the treaty provides that “the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory.” TREATY OF MEDICINE CREEK, Art. III, available at http://www.geocities.com/puyallup_tribe_of_indians/treaty.html (last visited Jan. 2, 2003).

52. *See Puyallup III*, 433 U.S. at 175. The Court agreed with Washington State and held that fair apportionment between tribal members and non-Indian sportsmen would be impossible if the Tribe were permitted to take an unlimited number of fish from the reservation portion of the river. *See id.*

53. *Id.* (refusing to re-examine unanimous decisions of *Puyallup I* and *II*).

54. *See id.* (recognizing that police power extends to fishing regulations). In *Puyallup III*, the Court quoted from *Puyallup II* for support of its holding: “Mr. Justice Douglas plainly stated that: ‘Rights can be controlled by the need to conserve a species . . . the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.’” *Id.* at 175-76 (quoting *Puyallup II*, 414 U.S. 44, 49 (1973)).

55. *See Roat, supra* note 30, at 706 (discussing treaty conflict analysis).

56. *See Puyallup I*, 391 U.S. 392, 398 (1968) (describing proper inquiry for determining when conservation exception applies).

57. *Id.* (stating fishing rights at issue to be manner of fishing, site of take and restriction of commercial fishing).

58. *See Roat, supra* note 30, at 708-09 (arguing first question focuses on need, not reasonableness).

state regulation must be a reasonable and necessary conservation measure.⁵⁹ While the Court did not entertain the specific meaning of "reasonable and necessary," it relied on the stipulation of the parties that the activities of the Puyallup Tribe threatened the extermination of the fish.⁶⁰

Second, in assessing whether the regulation met appropriate standards, the Court examined the means chosen by the state to attain the conservation goal.⁶¹ Here, the Court maintained that state regulations concerning the time and manner of fishing were sound if they sought to achieve the necessary conservation goals.⁶²

Finally, under the third inquiry, the Court required that the regulation be applied in a non-discriminatory manner.⁶³ Often the grant of tribal hunting and fishing treaty rights coexists with rights of non-tribal citizens.⁶⁴ Regulation of those rights must apply non-discriminatorily to tribal members and other citizens.⁶⁵

The Supreme Court recently reaffirmed the "conservation necessity exception" in *Minnesota v. Mille Lacs Band of Chippewa*.⁶⁶ In that case, several tribal members from the Chippewa Band filed suit against the State of Minnesota, seeking declaratory relief to retain certain hunting and fishing rights on their reservation.⁶⁷ The Supreme Court held that the Chippewa maintained those rights pursuant to an 1837 Treaty.⁶⁸ The rights must be exercised in a manner compatible with the interests of state wildlife regulations and natural resources.⁶⁹ When the interests are no longer compatible and tribal use of natural resources threatens a state's conservation efforts, the interest of the Tribe yields to the interest of the State: "We have repeatedly reaffirmed state authority to impose rea-

59. See *Puyallup I*, 391 U.S. at 401-03 (stating lower court gave no authoritative answer to question of reasonableness and necessity).

60. See *id.* at 402 n.15 (referring to stipulation that if defendants kept fishing, salmon were in jeopardy of extinction).

61. See *id.* at 401 n.14 (discussing appropriate nature and scope of regulation).

62. See *id.* (arguing certain types of regulations permissible).

63. See *id.* at 403 (discussing equal protection issue when implementing regulations).

64. See Roat, *supra* note 30, at 710 (discussing treaties which preserved rights in common with other citizens).

65. *Puyallup I*, 391 U.S. at 403 (stating any ultimate finding must also cover issue of equal protection).

66. 526 U.S. 172 (1999).

67. See *id.* at 176 (explaining type of relief sought by Tribe).

68. See *id.* Under the terms of the treaty, the Tribe ceded land to the United States in exchange for hunting, fishing and gathering rights. See *id.* at 176-77.

69. See *id.* at 204 (recognizing that rights must be compatible with state regulation).

sonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation.”⁷⁰ Thus, as recently as 1999, the conservation exception from *Puyallup* remains a relevant consideration for state regulation.⁷¹

C. Reconciling Environmentalism with Tribal Sovereignty

Increased environmental awareness in the United States has coincided with a comparable increase in Native American autonomy over natural resource management on reservations.⁷² Environmental groups and states in favor of government regulation argue that tribal lands account for millions of acres in the United States, which may be suffer environment harm without state regulation.⁷³ The tribal response to this concern is that self-regulation “of natural resources and environmental pollution is appropriate for tribal nations . . . because of the historical association between Native Americans and ‘Mother Earth.’”⁷⁴

The federal government has recognized the potential conflict between environmental goals and tribal sovereignty, and has created the American Indian Environmental Office (AIEO) to strengthen environmental protection on tribal lands.⁷⁵ This office helps tribes coordinate the efforts of the federal Environmental Protection Agency (EPA) with an emphasis “on building Tribal ca-

70. *Id.* at 205 (citing *Puyallup Tribe v. Dep’t of Game of Wash.*, 391 U.S. 392, 398 (1968)).

71. *See Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 205 (holding conservation exception as proper accommodation of tribal and state interests).

72. *See, e.g.*, Gregory P. Crinion & Tracey Smith Lindeen, *Environmental Law and Indian Lands*, 69 WIS. LAW. 14, 14-15 (Sept. 1996) (discussing tribal self-government of environmental affairs). The authors argue: “American Indian tribes are assuming an increasing role in regulating activities that affect the air, water and land on tribal reservations. This expanding role results, in part, from efforts of the tribes to protect tribal lands through regulatory means.” *Id.* at 14.

73. *See* STRATEGIC PLAN 2000-2005: BUREAU OF INDIAN AFFAIRS U.S. DEP’T OF THE INTERIOR (2000). The Bureau of Indian Affairs [hereinafter BIA] is located within the Department of the Interior, and oversees the management of more than 43,400,000 acres of tribal-owned land. *See id.*

74. *See* Stuckey, *supra* note 6, at 11,206 (discussing tribal sense of responsibility to regulate resources). *But see* David Rich Lewis, *Native Americans and the Environment: A Survey of Twentieth Century Issues*, 19 AMER. INDIAN Q. 423-50 (1995) (finding no Indian consensus on balance between environmentalism and materialism exists). In an attempt to restore an environmental mission, many Native environmentalist groups have been formed, such as Native Americans for a Cleaner Environment. *See id.*

75. *See* Stuckey, *supra* note 6, at 11,207 (describing office of AIEO).

capacity to administer their own environmental programs.”⁷⁶ Since the 1980s, EPA’s goal has been to give tribes authority to make and enforce their own environmental regulations.⁷⁷ EPA has granted significant power to tribes in the regulation of air pollution, water pollution, solid waste, nuclear waste and natural resources.⁷⁸

Despite EPA attempts to ensure that Native Americans will regulate tribal lands to benefit the environment, state environmental offices still attempt to impose their regulations on tribes, especially in the area of natural resources.⁷⁹ Many tribes turn to the federal courts to vindicate their federal treaty rights to occupy and use reservation lands free from state regulation.⁸⁰ Under certain circumstances, however, tribes are barred from suing states under the Eleventh Amendment’s sovereign immunity doctrine.⁸¹

D. The Eleventh Amendment and Sovereign Immunity

The doctrine of sovereign immunity states that a government cannot be sued without its consent.⁸² This concept was transplanted to America from the English belief that the monarch could do no wrong.⁸³ Shortly after the Nation’s founding, the Eleventh

76. See Environmental Protection Agency, *available at* <http://www.epa.gov/indian/miss.htm> (last visited Sept. 14, 2002). This website lists the responsibilities of the AIEO, emphasizing cooperation between tribes and the EPA. *Id.*

77. See Stuckey, *supra* note 6, at 11,206 (claiming tribes are on equal par with states to regulate environment).

78. See *id.* at 11,209-12. For example, under the Clean Air Act [hereinafter CAA] “tribal nations have the authority to regulate air quality on Native American reservations.” *Id.* at 11,209. Similarly, Congress amended the Clean Water Act (CWA) to give tribes authority similar to states for the purpose of water pollution regulation. See *id.* In the area of solid waste management, tribes may exercise jurisdiction on reservation lands through appropriate legislation. See *id.* at 11,211.

79. See, Lewis, *supra* note 5 (discussing imposition of regulations by state environmental offices). Perhaps because the land and its resources play such an important role in the lives of Native Americans, the use of those resources are important to environmentally-conscious tribes. See *id.* Sometimes tribal use of natural resources conflicts with goals established by the ESA. See Johnson, *supra* note 2, at 524 (discussing Endangered Species Act and its impact on Indian tribes); see also Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 167 (2002) (discussing uproar by environmental groups over hunting of California gray whale by Makah Indian Tribe).

80. See, e.g., Lauren E. Rosenblatt, *Removing the Eleventh Amendment Barrier: Defending Indian Land Title Against State Encroachment After Idaho v. Coeur d’Alene Tribe*, 78 TEX. L. REV. 719, 720 (2000) (discussing suit brought by tribe against State of Idaho).

81. For a discussion of the Eleventh Amendment and state sovereign immunity, see *infra* notes 82-122 and accompanying text.

82. See BARRON’S LAW DICTIONARY 479 (4th ed. 1996) (defining sovereign immunity doctrine as precluding suit against sovereign without sovereign’s consent).

83. See, John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895-96 (1983) (discussing original intent

Amendment was added to the United States Constitution to protect this concept.⁸⁴ The Eleventh Amendment protects states from being sued by citizens of different states or by foreign countries.⁸⁵ On its face, the Amendment expresses that states may not be sued by citizens of other states, but it is silent on the question of whether sovereign immunity prevents suits by a state's own citizens.⁸⁶ The Supreme Court addressed this issue in 1890 in the case of *Hans v. Louisiana*.⁸⁷ In a landmark decision, the Court held that the Eleventh Amendment's sovereign immunity prevented citizens from suing their own states, thus interpreting the language of the Amendment quite broadly.⁸⁸

Over the years, the Supreme Court carved out three notable exceptions to Eleventh Amendment immunity.⁸⁹ First, the Court held that a state may waive its sovereign immunity in *Atascadero v. Scanlon*.⁹⁰ This waiver exception is narrow and is permitted only

of Framers' conception of sovereign immunity). Early writings about the concept can be found in the Federalist Papers:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

84. See Timothy S. McFadden, *The New Age of the Eleventh Amendment: A Survey of the Supreme Court's Eleventh Amendment Jurisprudence and a Review of Kimel v. Florida Board of Regents*, 27 J.C. & U.L. 519 (2000). In 1793, the Supreme Court held that the Constitution did not protect a state from a suit by a citizen of another state. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *Chisholm* involved a suit by a South Carolina citizen against the state of Georgia to recover a Revolutionary War Debt. See *id.* After that decision, states feared an endless stream of litigation and hence encouraged quick passage of the Eleventh Amendment to prevent that scenario. *Id.*

85. U.S. CONST. amend. XI (prohibiting suits against states by citizens of other states).

86. See *id.* (noting silence on issue of whether sovereign immunity prevents suits by state's own citizens).

87. 134 U.S. 1 (1890). *Hans* brought suit in federal court against the State of Louisiana, in an effort to collect on state-issued bonds. See *id.* at 1-3.

88. See Randy L. Meyer, *The Supreme Court's Analysis in Idaho v. Coeur d'Alene Tribe of Idaho: Is The Young Exception to the Eleventh Amendment Inapplicable to Indian Tribe Claims*, 30 U. TOL. L. REV. 131, 136 (1998) (arguing interpretation of *Hans* as broadly extending Eleventh Amendment).

89. See McFadden, *supra* note 84, at 537-52 (discussing three exceptions to Eleventh Amendment immunity).

90. See *Atascadero v. Scanlon*, 473 U.S. 234 (1985) (holding waiver of Eleventh Amendment as exception to sovereign immunity). *Scanlon* brought an action against a California State Hospital, alleging discrimination in job hiring due to a physical handicap. See *id.* at 234. The Supreme Court held that the suit was barred by the Eleventh Amendment, because the waiver found in the California Constitution did not specify the State's willingness to be sued in federal court. See *id.*

when the state does so expressly and unmistakably.⁹¹ Second, in *Fitzpatrick v. Bitzer*,⁹² the Court held that Congress may occasionally abrogate the Eleventh Amendment through statutes.⁹³ Fitzpatrick brought suit against the State of Connecticut alleging a violation of Title VII of the Civil Rights Act of 1964.⁹⁴ The Court permitted the suit, arguing that when Congress acts pursuant to Section Five of the Fourteenth Amendment, it may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts."⁹⁵ Here, the suit was permissible because the Civil Rights Act of 1964 was enacted pursuant to Section Five of the Fourteenth Amendment.⁹⁶

After *Fitzpatrick*, the Supreme Court expanded statutory abrogation to include the Commerce Clause in *Pennsylvania v. Union Gas Co.*⁹⁷ Seven years after *Union Gas*, the Court reversed itself in *Seminole Tribe v. Florida*,⁹⁸ holding that statutory abrogation did not extend to the Commerce Clause.⁹⁹ Current jurisprudence allows

91. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (holding waiver valid if express and unmistakable). In this case, a Florida state entity began its own tuition pre-payment program. See *id.* at 666. College Saving Bank alleged misrepresentation and sued under the Trademark Remedy Clarification Act [hereinafter TRCA]. See *id.* The Court held that the suit was barred because TRCA did not validly abrogate the state's sovereign immunity. See *id.*

92. 427 U.S. 445 (1976).

93. See *id.* at 456 (stating that Congress has legislative authority to abrogate Eleventh Amendment).

94. See *id.* at 448 (discussing nature of lawsuit).

95. *Id.* at 456 (noting Congress's ability to provide for private suits against states when it acts pursuant to § 5).

96. See *id.* (concluding statutes enacted pursuant to § 5 may abrogate Eleventh Amendment).

97. 491 U.S. 1 (1988). In this case, Union Gas operated a coal gasification plant in Pennsylvania, which produced tar as a by-product. See *id.* at 5. The plant closed in 1950. See *id.* In 1980, the State of Pennsylvania, along with the EPA, worked to clean up the remaining tar deposits that threatened the water quality of nearby waterways. See *id.* at 6. The United States, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [hereinafter CERCLA] sued Union Gas to recover costs. See *id.* Union Gas filed a third-party complaint against Pennsylvania, but the district court dismissed the claim based on Eleventh Amendment immunity. See *id.* The Supreme Court reversed. See *id.*

98. 517 U.S. 44 (1996).

99. See *id.* at 75 (holding that Congress does not have authority to abrogate immunity under Indian Commerce Clause). The Seminole Tribe sued the State of Florida arguing that the State failed to comply with the Indian Gaming Regulation Act [hereinafter IGRA]. See *id.* at 55. Florida argued Eleventh Amendment immunity, and the Supreme Court agreed, stating that while IGRA clearly expressed congressional intent to abrogate sovereign immunity, Congress acted beyond a valid exercise of power. See *id.* at 58. The Court then overturned its decision in *Union Gas*, arguing that Congress may abrogate a state's sovereign immunity only pursuant to § 5 of the Fourteenth Amendment. See *id.* at 72.

Congress to abrogate a state's sovereign immunity only if it is pursuant to Section Five of the Fourteenth Amendment.¹⁰⁰

Under a final exception to sovereign immunity announced in the 1908 decision of *Ex parte Young*, a citizen may sue a state officer directly in his or her official capacity.¹⁰¹ In that case, the Minnesota legislature created a commission to regulate railroad rates.¹⁰² The stockholders of the Northern Pacific Railroad challenged the commission.¹⁰³ The suit named Edward T. Young, State Attorney General, as defendant, but he argued that the suit was barred by the Eleventh Amendment's sovereign immunity cloak.¹⁰⁴ The Supreme Court disagreed and permitted a suit for injunctive relief against a state official when the official acts in violation of federal law.¹⁰⁵

While the *Ex parte Young* exception can avoid the restrictions of the Eleventh Amendment, it has been narrowed over the years.¹⁰⁶ For example, in *Edelman v. Jordan*,¹⁰⁷ the Supreme Court held that the exception applies only to suits seeking prospective relief.¹⁰⁸ The Court insisted that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, . . . and may not include a retroactive

100. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (determining when Congress legislates pursuant to § Five of Fourteenth Amendment). In *Flores*, the Archbishop of San Antonio sued the City of Bournes for violation of the Religious Freedom Restoration Act [hereinafter RFRA]. See *id.* at 511. The Court ruled that Congress's power to abrogate sovereign immunity, as expressed in RFRA, was impermissible because Congress's power under § 5 is remedial only, not substantive. See *id.* at 532-36. After *Seminole Tribe* and *Flores*, the Court continued its trend of disallowing congressional abrogation of sovereign immunity in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). The *Kimmel* Court held that Congress may not abrogate state sovereign immunity under the Age Discrimination and Employment Act [hereinafter ADEA]. See *id.* at 84. Abrogation of sovereign immunity must follow from a valid purpose under § 5 of the Fourteenth Amendment, and it is the role of the courts to determine what that purpose is. See *id.*

101. See *Ex parte Young*, 209 U.S. 123 (1908); see also McFadden, *supra* note 84, at 539 (explaining *Ex parte Young*).

102. See *Ex parte Young*, 209 U.S. at 127 (discussing scheme of railroad rate regulation).

103. See *id.* at 129 (describing nature of action in law suit).

104. See *id.* at 132 (explaining Young's argument).

105. See McFadden, *supra* note 84, at 540 (arguing Eleventh Amendment does not bar suit even when remedy frustrates official state policy).

106. See *id.* at 541 (recognizing modifications in doctrine).

107. 415 U.S. 651 (1974).

108. See McFadden, *supra* note 84, at 541 (discussing Court's holding in *Edelman v. Jordan*, 415 U.S. 651 (1974)).

award which requires the payment of funds from the state treasury.”¹⁰⁹

In 1997, the Supreme Court decided *Idaho v. Coeur d’Alene Tribe of Idaho*¹¹⁰ which further narrowed the *Ex parte Young* doctrine.¹¹¹ The Coeur d’Alene Tribe alleged ownership of the submerged lands and bed of Lake Coeur d’Alene.¹¹² It brought suit in federal court against the State of Idaho and various state officials, seeking declaratory judgment that its use of the lake was exclusive.¹¹³ Justice Kennedy, writing for the majority, held that sovereign immunity prevented the Tribe from suing the State of Idaho.¹¹⁴ While on its face the suit would seem to meet the *Ex parte Young* criteria seeking only prospective injunctive relief, Justice Kennedy argued:

[t]o interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court’s federal question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings.¹¹⁵

After *Coeur d’Alene*, courts must weigh and balance a state’s interests when determining whether to permit a suit to continue under an *Ex parte Young* exception.¹¹⁶ In particular, if the suit implicates a “special sovereignty interest,” the Eleventh Amendment

109. *Edelman v. Jordan*, 415 U.S. 651, 677 (holding remedial relief is limited to prospective injunctive relief).

110. 521 U.S. 261 (1997).

111. *See id.* at 287 (holding *Ex parte Young* inapplicable in certain circumstances).

112. *See id.* at 264 (stating alleged tribal ownership of lakebed).

113. *See id.* at 265 (describing nature of lawsuit).

114. *See id.* at 287 (finding *Ex parte Young* exception inapplicable). Early in the decision, Justice Kennedy noted the “well-established principle” that tribes are subject to the Eleventh Amendment: “In *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), we rejected the contention that sovereign immunity only restricts suits by individuals against sovereigns, not by sovereigns against sovereigns.” *Id.* at 268.

115. *Coeur d’Alene*, 521 U.S. at 270 (recognizing need to limit *Ex parte Young* exception).

116. *See id.* at 278. The weighing of a state’s interests requires a case-by-case analysis of the *Ex parte Young* doctrine. *See id.* at 280.

may bar the suit even if, under *Ex parte Young*, the suit would have been permitted.¹¹⁷

Lower federal courts have struggled to determine the effect of *Coeur d'Alene* on the *Ex parte Young* exception.¹¹⁸ While Kennedy's majority opinion sought a balancing test to determine whether a special sovereign state interest overrides *Ex parte Young*, only Justice Rehnquist pointedly endorsed the test.¹¹⁹ Many lower courts have maintained that *Ex parte Young* remains valid, and that *Coeur d'Alene* changes application of the Eleventh Amendment only in circumstances factually similar to *Coeur d'Alene*.¹²⁰ For example, the Ninth Circuit has argued that it was *Coeur d'Alene*'s unique divestiture of the state's control over its own lands that made the *Ex parte Young* exception inapplicable.¹²¹

IV. NARRATIVE ANALYSIS

In *Timpanogos Tribe*, the Tenth Circuit addressed the issue of whether the Tribe's suit against Utah State environmental officials was barred by the Eleventh Amendment.¹²² At the outset, the Tenth Circuit noted the primacy of determining the sovereign im-

117. *See id.* at 287-88. Because the issue in *Coeur d'Alene* involved navigable waters, the Court found that this implicated a unique special sovereignty interest. *Id.* Hence, the suit was impermissible. *See id.* at 284.

118. *See*, MCI Telecommunications Corp. v. Bell Atlantic PA, 271 F.3d 491, 506 (3d Cir. 2001) (citing "confusion" as to scope of *Coeur d'Alene*'s special sovereignty interest).

119. *See*, Meyer, *supra* note 88, at 150 (stating that plurality of Court pointedly rejected balancing test).

120. *See*, AT & T Communications v. Bell South Telecommunications Inc., 238 F.3d 636, 648 (5th Cir. 2001) (holding application of *Ex parte Young* unaffected by *Coeur d'Alene*); *see also* Joseph A. *ex rel* Wolfe v. Ingram, 262 F.3d 1113 (10th Cir. 2001) (rejecting *Coeur d'Alene* argument for state welfare programs); CSX Transp. Inc. v. Board of Public Works, 40 Fed. Appx. 800 (4th Cir. 2002) (holding application of *Coeur d'Alene* to its facts).

121. *See* Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F. 3d 1041, 1044 (9th Cir. 2000) (giving narrow interpretation of *Coeur d'Alene*).

122. *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1198-99 (10th Cir. 2002). The defendants filed a motion to dismiss on four other grounds, but the Tenth Circuit declined to review those issues: 1) *res judicata*; 2) lack of subject matter jurisdiction; 3) failure to join indispensable parties, and 4) laches. *See id.* Further, the Tenth Circuit refused to entertain the issue of whether tribal status affected the Tribe's right to bring an action in federal court, stating: "The crux of the defendants' contention . . . is that the Tribe has no federal right on which to base a claim because it is not a 'federally recognized' tribe." *Id.* at 1201. The Tenth Circuit stated that the rights asserted here by the Timpanogos spring from federal treaty rights. *See id.* at 1202. Further, the federal government recognizes tribes in a variety of ways for varied purposes. *See id.* at 1203. The Tenth Circuit concluded that "the fact that a tribe is not administratively recognized does not affect the tribe's vested treaty rights." *Id.*

munity issue.¹²³ Such an issue forms the basis for a valid interlocutory appeal.¹²⁴ In evaluating the merits of the sovereign immunity argument, the Tenth Circuit began with the proposition from *Hans v. Louisiana* that the Eleventh Amendment generally prevents citizen suits against states.¹²⁵ Suits against state officials seeking prospective relief may proceed, however, under the doctrine of *Ex parte Young*.¹²⁶ The Tenth Circuit explained that the Tribe's complaint here was specifically altered to comply with the *Ex parte Young* exception at the suggestion of the district court.¹²⁷ Given this alteration, the Tenth Circuit held that the amended complaint would "seek no more than an injunction barring Utah state officials from prosecuting members of the Timpanogos Tribe from hunting, fishing, and gathering with Tribe-issued licenses on Indian lands."¹²⁸ The complaint would thus place the suit well within the parameters of the *Ex parte Young* exception.¹²⁹

The Tenth Circuit's brief analysis employed a four-part test to determine the applicability of *Ex parte Young*: 1) is the suit against a state official or the state itself; 2) is the conduct a violation of federal law; 3) is the relief sought prospective in nature; and 4) does the suit implicate any special sovereignty interests.¹³⁰ The Tenth Circuit, after announcing the four-part test, summarily determined that the facts surrounding the Timpanogos claim met this test:

It [the claim] is against state officials for conduct that allegedly violates the rights of the Tribe under the Congressional Act of 1864. It seeks only prospective relief that would not in any way retroactively affect the state treasury. Finally, considering that the state has no sovereign interests over Indian land . . . the injunction sought implicates no special sovereignty interests.¹³¹

123. See *id.* at 1199 (noting initial jurisdictional concern of sovereign immunity claim).

124. See *id.* at 1201 (discussing primacy of interlocutory issue).

125. See *id.* at 1205 (citing *Hans v. Louisiana*, 134 U.S. 1, 13-15 (1890)) (arguing that Eleventh Amendment generally bars suit against state by citizens of that state or another state).

126. See *id.* (citing *Ex Parte Young*, 209 U.S. 123, 159-60 (1908)).

127. See *Timpanogos Tribe*, 286 F.3d at 1205 (noting that original complaint was broader than Eleventh Amendment would allow).

128. *Id.* (explaining why *Ex parte Young* would apply).

129. See *id.* (stating that *Timpanogos Tribe* makes clear case against state immunity).

130. See *id.* (citing framework from *Elephant Butte Irrigation Dist. v. Dep't of the Interior*, 160 F.3d 602, 609 (10th Cir. 1998)).

131. *Id.* at 1206 (determining that four-part test from *Ex parte Young* is met).

The Tenth Circuit distinguished *Coeur d'Alene*, arguing that the action to quiet title sought in that case was a prohibited form of relief that triggered Eleventh Amendment immunity.¹³² Ultimately, the Tenth Circuit affirmed the decision of the district court denying the state officials' motion to dismiss the Tribe's suit under the Eleventh Amendment.¹³³

V. CRITICAL ANALYSIS

The Tenth Circuit recognized that the Eleventh Amendment issue of sovereign immunity raised by the State of Idaho could prevent the district court from hearing the substance of the Tribe's claim.¹³⁴ Given the primacy of such an issue, it is surprising that the Tenth Circuit's analysis of the issue was brief and conclusory.¹³⁵ While the court outlined a "four-part test" for applying *Ex parte Young*, it did not illuminate its reasoning behind the conclusion that the test was met here.¹³⁶ In particular, the third element of the test required a more rigorous inquiry.¹³⁷ The third element asks whether the relief sought is "permissively prospective relief or analogous to a retroactive award of damages impacting the state treasury."¹³⁸ The Tenth Circuit, in concluding that the relief sought here was permissible under the test, stated, "it seeks only prospective relief that would not in any way retroactively affect the state treasury."¹³⁹ The prospective/retroactive dichotomy, however, is not so easily distinguished.¹⁴⁰ Suits that seek prospective relief may often impose monetary effects on the state treasury.¹⁴¹ Merely pleading prospective relief is not determinative.¹⁴² In the case at

132. See *Timpanogos Tribe*, 286 F.3d at 1206 (distinguishing *Coeur d'Alene*).

133. See *id.* (affirming district court). In one other recent instance, the Tenth Circuit gave a cursory review of Eleventh Amendment issues when it decided *MCI Telecommunications Corp. v. Public Service Commission*. See Stephanie Chapman, Note, 55 OKLA. L. REV. 175, 196 (2002) (concluding that Tenth Circuit failed to adequately review recent Eleventh Amendment jurisprudence).

134. See *Timpanogos Tribe*, 286 F.3d at 1199 (recognizing immediate appealability of jurisdictional issue such as immunity).

135. See *id.* (concluding, without analysis, that test was met).

136. See *id.* at 1206 (stating that action meets test).

137. See *id.* at 1205. Parts one and two of the test, asking if the action was against a state official, and whether the violation was of federal law, were arguably obvious, and did not require searching analysis. See *id.*

138. *Id.* (describing third element of *Ex parte Young* test).

139. *Timpanogos Tribe*, 286 F.3d at 1206 (limiting relief sought by tribe).

140. See Richard F. Russell, *State Sovereign Immunity and the Pulse of the United States Supreme Court*, 38 TENN. B.J. 29, 35 (May 2002) (recognizing difficulty of determining prospective versus retroactive relief to state treasury).

141. See *id.* (discussing differences set forth in *Edelman v. Jordan*). □

142. See *id.* (citing to *Coeur d'Alene*).

bar, the Tenth Circuit should have analyzed whether the relief sought, declaring freedom from state hunting and fishing regulations on the reservation, could have implicated the state's treasury.¹⁴³

Even if a case meets the *Ex parte Young* test, a non-monetary claim for prospective injunctive or declaratory relief may nevertheless implicate "special sovereignty interests" that, in turn, may serve to bar a suit.¹⁴⁴ This additional test was enunciated in *Coeur d'Alene*, and requires a court to weigh special state sovereignty interests against the interests of the litigant.¹⁴⁵ According to Justice Kennedy in *Coeur d'Alene*, this requires a "case-by-case" analysis.¹⁴⁶ The question in *Timpanogos Tribe* becomes whether the state's interest in applying the hunting regulation to the Tribe implicated a special sovereign interest that outweighed the interest of the Tribe.¹⁴⁷

The Supreme Court has offered little guidance to lower courts attempting to identify a state's special sovereignty interest.¹⁴⁸ One interpretation of the Court's decision suggests that a state interest "may be articulated as simply as it is under a rational basis test in an equal protection analysis."¹⁴⁹ Such a broad test could identify a significant number of state interests.¹⁵⁰ Others argue for a narrow interpretation of a state's sovereignty interest and would include interests similar to those in *Coeur d'Alene*.¹⁵¹ Under the latter narrow interpretation, only those issues imposing an obvious intrusion into state sovereignty, such as a claim to a state's property interest,

143. See *Timpanogos Tribe*, 286 F.3d at 1206 (concluding without analysis that relief sought was prospective).

144. See Russell, *supra* note 140, at 35 (discussing role of special sovereignty interests in barring suit against state official).

145. For a discussion describing the balancing of special sovereignty interest, see *supra* notes 110-17 and accompanying text.

146. See *Idaho v. Coeur d'Alene*, 521 U.S. 261, 280 (1997) (stating case-by-case analysis of *Young* doctrine is evident from precedent).

147. For a discussion of the Tenth's Circuit's conclusory consideration of a state's sovereignty interest, see *infra* notes 122-33 and accompanying text. The Tenth Circuit only briefly addressed the issue: "Finally, considering that the state has no sovereign interests over Indian land . . . the injunction sought implicates no special sovereignty interest." *Timpanogos Tribe*, 286 F.3d at 1206.

148. See *Coeur d'Alene*, 521 U.S. at 280 (stating that application of *Young* is "exercise in line-drawing").

149. John H. Clough, *Federalism: The Imprecise Calculus of Dual Sovereignty*, 35 J. MARSHALL L. REV. 1, 9 (2002) (interpreting *Coeur d'Alene* decision as allowing "state interest" to be determined by rational basis standard).

150. See *id.* (discussing instances in which state's sovereign interest has been broadly defined under *Coeur d'Alene* to include control over such activities as admission to bar, certain family relations, and property tax levies).

151. For a discussion of the lower courts' narrow interpretation of the *Coeur d'Alene* doctrine, see *supra* notes 114-17 and accompanying text.

would prohibit application of *Ex parte Young*.¹⁵² At a minimum, consequently, even under the narrow test, lower courts should be prepared to analyze the nature of a state's claim of special sovereignty interests in light of the interests advanced in *Coeur d'Alene*.¹⁵³

The question that the Tenth Circuit should have addressed in *Timpanogos Tribe* is whether the state's right to regulate hunting and fishing on reserved lands within state boundaries implicates a special sovereignty interest at least as important as that expressed in *Coeur d'Alene*.¹⁵⁴ Ordinarily, states will defer to the tribal exercise of treaty hunting and fishing rights on tribal reservations.¹⁵⁵ This deference, however, is not absolute.¹⁵⁶ In both *Puyallup III* and *Mille Lacs Band of Chippewa Indians*, the Supreme Court recognized exceptions to tribal sovereignty in the interest of state conservation measures.¹⁵⁷ The logical intersection of the decisions in *Puyallup III* and *Mille Lacs Band of Chippewa Indians*, combined with the holding in *Coeur d'Alene*, points inevitably to the conclusion that a state's hunting and fishing regulation may implicate a special sovereignty interest.¹⁵⁸ If this is true, the *Ex parte Young* exception is inapplicable, and the suit against the state is barred under the Eleventh Amendment.¹⁵⁹

In order to establish that the state conservation regulation at issue in *Timpanogos Tribe* could meet the state sovereignty interest test from *Coeur d'Alene*, the state would need to show that the conservation measure meets the requirements from *Puyallup I*; namely, that the conservation measure is necessary and non-discrimina-

152. See Clough, *supra* note 149, at 11 (arguing that sovereign interest in *Coeur d'Alene* concerning title to submerged land was obvious intrusion into state sovereignty).

153. See, Chapman, *supra* note 133, at 193 (noting that examination of special sovereignty issue is required by *Coeur d'Alene*).

154. See, *Timpanogos Tribe*, 286 F.3d at 1206. While the Tenth Circuit did mention *Coeur d'Alene*, its analysis fell short of addressing why no sovereignty interests were implicated. *Id.*

155. For a discussion of state deference to tribal hunting and fishing rights, see *supra* note 43 and accompanying text.

156. For a further discussion of exceptions to tribal sovereign immunity, see *supra* notes 41-71 and accompanying text.

157. For a discussion of the Supreme Court's holdings in *Puyallup III* and *Mille Lacs Band of Chippewa Indians*, see *supra* notes 46-71 and accompanying text.

158. See Stuckey, *supra* note 6, at 11,212 (stating species conservation is compelling state interest which may justify state regulation of Native American lands).

159. See *Idaho v. Coeur d'Alene*, 521 U.S. 261, 287-88 (1997) (holding Idaho's sovereign interest in land outweighed tribal claim to land).

tory.¹⁶⁰ Absent such a showing, the conservation measure is presumed unnecessary, and the compelling state interest disappears.¹⁶¹

VI. IMPACT

The Tenth Circuit's *Ex parte Young* analysis in *Timpanogos Tribe* failed to adequately consider the requirements of the Supreme Court's decision in *Coeur d'Alene*.¹⁶² Other lower courts faced with similar challenges to the *Ex parte Young* exception have examined the underlying sovereignty interests involved to determine if *Coeur d'Alene* would bar the suit against a state official.¹⁶³

In a climate of greater tribal autonomy over the regulation of natural resources on reservations, state challenges to tribal environmental sovereignty are likely to increase.¹⁶⁴ At the same time, recent Supreme Court jurisprudence has afforded greater protection for states seeking immunity under the shield of the Eleventh Amendment.¹⁶⁵ Although lower courts have applied the *Coeur d'Alene* doctrine narrowly, the rights at issue in *Timpanogos Tribe* arguably fit within that doctrine.¹⁶⁶ After *Coeur d'Alene*, states looking for ways around tribal control of environmental resources could argue a compelling sovereign interest in conservation under *Puyallup I* and *Puyallup III*.¹⁶⁷ Tribes unable to rebut the conservation exception will face serious obstacles to the exercise of their treaty rights to hunt and fish.¹⁶⁸

160. For a discussion of the requirements from *Puyallup I*, see *supra* notes 55-57 and accompanying text.

161. See *Puyallup I*, 391 U.S. 392, 398 (1968) (holding State may not interfere with treaty rights except to regulate for conservation exception).

162. For a discussion of the requirements from *Coeur d'Alene*, see *supra* notes 110-117 and accompanying text.

163. For a discussion of the lower courts' application of *Coeur d'Alene*, see *supra* notes 118-21 and accompanying text.

164. See, Lewis, *supra* note 5 (pointing to pervasive disputes between states and tribes); see also Stuckey, *supra* note 6, at 11,207 (discussing increasing role of tribes in environmental regulation as evidenced by establishment of AIEO).

165. See Buccino et al., *supra* note 17, at 16 (stating Eleventh Amendment jurisprudence threatens to upset federal/state partnership that characterizes modern environmental law).

166. For a discussion of the lower courts' interpretation of *Coeur d'Alene* as a narrow doctrine applying only to land-related interests, see *supra* notes 114-17, and accompanying text. Since the treaty rights at issue in *Timpanogos Tribe* are related to land use, they could arguably fall within the narrow exception. See *id.*

167. For an explanation of the conservation exception under *Puyallup I* and *Puyallup III*, see *supra* notes 46-57 and accompanying text.

168. See, Stuckey, *supra* note 6, at 11,212 (finding restrictions may be placed on tribes if hunting interferes with state conservation efforts).

By failing to adequately address these issues in *Timpanogos Tribe*, the Tenth Circuit leaves tribal rights vulnerable to challenges from states seeking to abrogate treaty rights in the name of state sovereignty over conservation.¹⁶⁹ In the *Coeur d'Alene* equation, the unique sovereignty interests inherently protected by tribal treaty rights would need to be weighed against state claims for control over environmental regulation.¹⁷⁰ The presumption of the preemption of state law in the area of tribal treaty rights would weigh favorably for tribes.¹⁷¹ On the other hand, the assertion of a valid conservation measure could weigh favorably for states.¹⁷² By ignoring the post-*Coeur d'Alene* reality of the Eleventh Amendment, the Tenth Circuit missed an opportunity to explore the question of when a state's natural resource regulation might trump tribal treaty rights, and vice versa.¹⁷³ Until courts address the impact of *Puyallup* and *Coeur d'Alene* on tribal suits against states, the right of tribes to sue states over natural resource regulation remains ambiguous.

Susan R. Fiorentino

169. See *id.* (noting vulnerability of treaty rights when exercise of rights conflicts with state conservation efforts).

170. See *Idaho v. Coeur d'Alene*, 521 U.S. 261, 278 (1997) (holding that careful balance of state interests are needed when determining application of *Ex parte Young* doctrine).

171. See Reynolds, *supra* note 1, at 784 (discussing doctrine of preemption).

172. See *id.* at 792 (predicting that conservation is valid state regulation preempting tribal treaty rights).

173. For a further discussion of how the Tenth Circuit missed an opportunity to discuss the balancing of tribal hunting and fishing interests against state conservation interests, as required by *Coeur d'Alene*, see *supra* notes 154-61 and accompanying text.

